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Che Omar bin Mohd Akhir v Public Prosecutor

B FEDERAL COURT (KUCHING) — CRIMINAL APPEAL NO 05–5 OF 2003
NIK HASHIM, HASHIM YUSOFF AND AZMEL FCJJ
20 APRIL 2007

C *Criminal Law — Murder — Defence of grave and sudden provocation — Suspicion of adultery — Gradual and accumulated provocation — Whether amounted to grave and sudden provocation — Whether reasonable man provoked — Penal Code s 300 Exception 1*

D Che Omar, a police lance corporal stationed in Ampang, Selangor married Maray, a Sarawakian, with whom he had a daughter. Without the knowledge of her husband, Maray left for Sarawak with her daughter. Che Omar allegedly received threatening phone calls warning him not to go to Sarawak. Che Omar went to Sarawak and, apparently fearing that he was being followed by two men, bought a knife. Failing to find Maray, Che Omar had a few drinks in a bar. He went again to the food stall run E by Maray's mother where he saw his wife in the company of one Awang. He confronted Maray and asked her why she had not been home for a week and where she had been staying. Maray apparently responded by talking very loudly and roughly, saying where she was and whom she stayed with was not his concern. She refused to return home as she was not free. When asked about Awang, Maray F replied that Awang was 'her man'. She instructed Che Omar to leave Sarawak and not to return. Che Omar stabbed Maray to death and later charged with the murder of Maray. His defence was that the crime of murder was mitigated by the provocation offered by the deceased. There was provocation by Maray's actions and her remarks on the night in question. He claimed her words and actions caused him to feel 'dayus' or demeaned. The trial court dismissed his defence of provocation and Che Omar G was convicted and sentenced to death. He appealed to the Court of Appeal which dismissed his appeal. Hence, his appeal to the Federal Court.

H **Held**, dismissing the appeal:

(1) In order to bring a defence of grave and sudden provocation within Exception 1 to s 300 of the Penal Code, the following facts need to be established: (i) the offender must have done the act whilst deprived of the power of self-control; (ii) he must have been so deprived by reason of the provocation; (iii) the I provocation must have been grave and sudden; (iv) the provocation must not have been sought by the offender; (v) the provocation must not have been sought by the offender as an excuse for doing the act; (vi) the provocation must not have been given by anything done: either (a) in obedience to the law; or (b) by a public servant in the lawful exercise of his powers as such; or (c) in the lawful exercise of the right of private defence (see para 13).

(2) The question whether the provocation was grave and sudden such as to make the accused lose his self-control is a question of fact and not one of law. Each case is to be considered according to its own facts. The court must decide on the particular circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused. In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncracies of the accused (see paras 14–15).

(3) The defence of provocation is a dual one: the alleged provocative conduct must be such as: (i) actual causes in the accused; and (ii) might cause in a reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased (see para 16); *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211 followed; *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 and *Madhavan v State of Kerala* AIR 1966 Ker 258 (260) referred.

(4) It is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. The court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation (see para 17). In the present case, the only provocation was a suspicion of adultery. The provocation was gradual. There is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of its gravity and suddenness (as in the case here) a gradual and accumulated provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the PC (see para 22); *Vijayan v Public Prosecutor* [1975] 2 MLJ 8 referred and *Public Prosecutor v Lim Eng Kiat* [1995] 1 MLJ 625 distingushed.

[Bahasa Malaysia summary

Che Omar, seorang lans korporal polis yang ditugaskan di Ampang, Selangor telah berkahwin dengan Maray, yang berasal daripada Sarawak, yang mana mereka dikurniakan seorang anak perempuan. Tanpa pengetahuan suaminya, Maray meninggalkan Sarawak dengan anak perempuannya. Che Omar dikatakan telah menerima panggilan telefon yang mengugut dan memberi amaran kepadanya agar tidak pergi ke Sarawak. Che Omar telah pergi ke Sarawak dan, oleh sebab berasa bimbang yang beliau diekori dua orang lelaki, telah membeli pisau. Gagal mencari Maray, Che Omar telah pergi ke sebuah bar untuk minum. Beliau kemudian ke gerai makan yang dikendalikan oleh ibu Maray di mana beliau melihat isterinya bersama seorang bernama Awang. Beliau bersemuka dengan Maray dan bertanyakan kenapa tidak pulang ke rumah sejak seminggu lalu dan di mana beliau tinggal sekarang. Maray dikatakan telah menjawab dengan nada yang kuat dan kasar, mengatakan bahawa di mana beliau berada dan dengan siapa beliau tinggal adalah urusannya sendiri. Beliau enggan pulang ke rumah kerana tidak bebas. Apabila ditanya tentang Awang, Maray menjawap bahawa Awang adalah 'lelakinya'. Beliau mengarahkan Che

Omar meninggalkan Sarawak dan tidak kembali lagi. Che Omar telah menikam Maray sehingga mati dan telah dituduh membunuh Maray. Pembelaannya adalah bahawa jenayah membunuh itu dimitigasikan dengan provokasi yang menyebabkannya berasa dayus atau direndahkan maruahnya. Mahkamah perbicaraan telah menolak pembelaan provokasinya dan Che Omar telah disabitkan dan dijatuhkan hukuman mati. Beliau merayu ke Mahkamah Rayuan yang menolak rayuannya. Beliau merayu sekarang ke Mahkamah Persekutuan.

Diputuskan, menolak rayuan tersebut:

(1) Bagi tujuan mengemukakan pembelaan provokasi yang berbahaya dan tiba-tiba dalam Pengecualian 1 kepada s 300 Kanun Keseksaan fakta-fakta berikut perlu dibuktikan: (i) pesalah mesti telah melakukan tindakan yang di luar kawalannya; (ii) beliau mestilah bertindak sedemikian disebabkan provokasi; (iii) provokasi itu mestilah berbahaya dan tiba-tiba; (iv) provokasi itu mestilah suatu yang tidak dicari oleh pesalah; (v) provokasi itu mestilah tidak dicari oleh pesalah sebagai alasan untuk melakukan tindakan itu; (vi) provokasi itu mestilah tidak dimulakan oleh apa-apa yang dilakukan: sama ada (a) yang menurut undang-undang; atau (b) oleh pegawai awam yang melaksanakan kuasanya dengan sah; atau (c) yang dilaksanakan dengan sah hak untuk mendapat pembelaan peribadi (lihat perenggan 13).

(2) Persoalan sama ada provokasi adalah berbahaya dan tiba-tiba seperti membuat tertuduh hilang kawalan diri adalah satu persoalan fakta dan bukan undang-undang. Setiap kes hendaklah dipertimbangkan menurut fakta-faktanya sendiri. Mahkamah hendaklah memutuskan berdasarkan keadaan tertentu kes tersebut sama ada provokasi adalah berbahya dan tiba-tiba untuk membenarkan pendapat yang jenayah telah dilakukan oleh tertuduh. Dalma menentukan apa yang membentuk provokasi berbahaya dan tiba-tiba mahkamah perlu mengambilkira tabiat, sikap dan perasaan kelas atau golongan yang mana tertuduh tergolong, tetapi bukan idiosinkrasi terntentu tertuduh itu sendiri (lihat perenggan 14–15).

(3) Terdapat dua pembelaan untuk provokasi: perbuatan provokasi yang dikatakan mestilah: (i) sememangnya menyebabkan tertuduh; dan (ii) mungkin menyebabkan seorang yang waras, hilang kawalan diri secara tiba-tiba dan untuk sementara sehingga beliau membunuh si mati (lihat perenggan 16); *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211 diikut; *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251 dan *Madhavan v State of Kerala* AIR 1966 Ker 258 (260) dirujuk.

(4) Adalah tidak mencukupi untuk menunjukkan bahawa tertuduh telah dibangkitkan kemarahannya sehingga hilang kawalan diri; perlu ditunjukkan bahawa provokasi itu adalah berbahaya dan tiba-tiba dan berdasarkan keseriusannya menyebabkan seorang yang waras hilang kawalan diri dan menyebabkannya melakukan tindakan yang mengakibatkan kematian si mati. Mahkamah mungkin juga menimbangkan, bersama faktor-faktor lain, sifat tindak balas oleh tertuduh, setelah mengambilkira sifat provokasi itu (lihat perenggan 17). Dalam kes semasa, provokasi yang wujud hanyalah rasa syak adanya hubungan berzina. Provokasi itu timbul secara beransur-ansur.

Tiada provokasi yang beransur-ansur dan berkumpul yang membentuk provokasi yang berbahaya dan tiba-tiba. Jika tiada sifat berbahaya dan tiba-tiba itu (seperti dalam kes ini) provokasi yang beransur-ansur dan berkumpul tidak memadai untuk membentuk satu pembelaan di bawah Pengecualian 1 kepada s 300 Kanun Keseksaan (lihat perenggan 22); *Vijayan v Public Prosecutor* [1975] 2 MLJ 8 dirujuk dan *Public Prosecutor v Lim Eng Kiat* [1995] 1 MLJ 625 dibeza.]

Notes

For a case on s 302 Exception 1 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) para 1478.

Cases referred to

Che Omar bin Mohd Akhir v PP [1999] 2 MLJ 689 (refd)
Kuan Ted Fatt v PP [1985] 1 MLJ 211 (folld)
Looi Wooi Saik v PP [1962] MLJ 337 (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251 (refd)
Madhavan v State of Kerala AIR 1966 Ker 258 (260) (refd)
Mat Sawi bin Bahodin v PP [1958] MLJ 189 (refd)
PP v Lim Eng Kiat [1995] 1 MLJ 625 (distd)
Vijayan v PP [1975] 2 MLJ 8 (refd)

Legislation referred to

Penal Code ss 300, 302, 304
Penal Code [Brunei] ss 302, 304

Appeal from: Criminal Appeal No Q–05–87 of 1997 (Court of Appeal, Kuching)

Abdul Rahman bin Hj Mohamad Hazmi (Abdul Rahman & Albert Litor) for the appellant.
Raja Rozela bte Raja Toran (Deputy Public Prosecutor) for the respondent/prosecution.

Nik Hashim FCJ (delivering judgment fo the court):

BACKGROUND

[1] The appellant was convicted and sentenced to death by the High Court for the murder of his second wife Maray Chelek ak Rindat @ Nur Afiza bte Abdullah ('the deceased') on 2 March 1996 at about 2150 hours at the Sunday Market, Jalan Satok Kuching, Sarawak in contravention of s 302 of the Penal Code ('the PC'). His appeal against the conviction and sentence was dismissed by the Court of Appeal (see *Che Omar bin Mohd Akhir v Public Prosecutor* [1999] 2 MLJ 689). The appellant appealed to us. On 6 February 2007 we unanimously dismissed the appeal and affirmed the conviction and sentence.

[2] The appellant married the deceased in June 1993 at Padang Besar Thailand. The deceased was a native of Sarawak and hailed from Kuching. The appellant came

to know her when she was working as a guest relations officer in a karaoke lounge in Kuala Lumpur. From the marriage, they had a daughter. The appellant was a lance corporal in the Anti-Drug Section of the Police Force before his arrest. They stayed at the police barracks at Ampang Police Station, Kuala Lumpur where the appellant was attached. His first wife (DW2) was a nurse and he had three children by her.

[3] During their marriage, the deceased used to go back to Kuching to visit her mother (PW9) and the appellant sometimes would accompany her. On 13 February 1996 the deceased left for Kuching together with her daughter without the knowledge or approval of the appellant. The appellant looked for the deceased amongst her friends in Kuala Lumpur but without success. He claimed that he received two threatening phone calls one on 24 February 1996 threatening to kill him if he went to Sarawak and the other call was on 28 February 1996 calling him to fetch his child. He then proceeded to Kuching by air with his brother on 2 March 1996.

[4] On arrival in Kuching, he went looking for the deceased at her Kampong but failed to locate her. He then proceeded to Kuching town and bought a knife after he claimed that two men were following him.

[5] After failing to locate the deceased at the stall of her mother at the Sunday Market, Jalan Satok, he proceeded to a karaoke lounge where he drank stout and beer.

[6] Subsequently, he left for the stall of the deceased's mother where he met the deceased. He talked to the deceased about their relationship and why she left him. At that time, Awang Jamaluddin, PW7 was also at the stall. This is what the appellant said in his examination-in-chief:

> I asked her why she treated me like this. She answered that it was her own business: 'I can do what I like — why do you want to know about it.' I asked her again why she had not returned home for a week and where she was staying. She answered me loudly saying that where she was and with whom she was staying was her own business and why I should know about it. I asked her again why she did not return to the house as it was our child's birthday. She answered that whether she wanted to return home or not was her own business and she also said she was not free. I pointed at Awang and asked her 'Who is that man?' She answered 'He is my man — why do you want to know?' I told her 'How about me?' She replied 'That's your business, you can go wherever you want!' I asked her again who was the man seated next to her. She replied: 'He is my man — why you want to know — you can go back and don't come again.

[7] The appellant said that the deceased was talking loudly and roughly to him and as he could not stand her responses and the manner in which she answered him, which made him feel less than a man and caused him to suffer what he called 'dayus' in Malay, he therefore stabbed the deceased three or four times with the knife. The police personnel subsequently came to the scene and arrested the appellant. The knife (P2) with blood stain of the deceased was recovered from the scene by the police.

[8] According to the pathologist (PW15), he found seven stab wounds on the deceased's body: four on her chest and three on her back. The cause of death was hypovolaemic shock due to massive bilateral haemothorax due to the stab wounds on the right chest. The right lung had been punctured as a result of the stab wounds. A

[9] It is the appellant's defence that there was grave and sudden provocation brought about by what the deceased had said to the appellant when he met her at the Satok Sunday Market on the night in question. B

HIGH COURT

[10] This is what the learned High Court judge (Steve Shim J (as he then was)) said of the appellant's defence: C

> In the instant case, it is the defence contention that there was grave and sudden provocation brought about by what Maray had said to the accused when he met her at the Satok Sunday Market on the night of 2 March 1996. It is, I think, not disputed that they had engaged in a conversation and that during this conversation Maray had been somewhat rude and offensive towards the accused as a result of which, the accused said he felt he had suffered 'dayus' — a term which had been described by Ustadz Hj Loling Othman bin Alwi, an Islamic Affairs Officer, to mean a man allowing his wife to have an illicit affair with another person, the effect of which, according to him, constituted an attack upon his credibility as a husband. Given the fact that the accused might have been angered, offended or even humiliated by what his wife Maray had said, the question is whether the defence of grave and sudden provocation is applicable in such a situation. Would a reasonable man, placed in the situation and circumstances the accused was placed, have been so provoked as to lose his self-control thereby causing him to whip out a knife and stab his wife in the manner he did? The answer would be in the negative. In my view, a man placed in the situation and circumstances the accused was placed, belonging to the same cultural, social and emotional background and holding similar traditional and religious values and beliefs, would have exercised sufficient self-restraint and a degree of tolerance. He would have faced the situation realistically and would have resorted to peaceful means of seeking a reunion with his wife who might have been led astray. He would not have taken the law into his own hands by inflicting such grave injuries on his wife with a knife. He would not have contemplated such violent and cowardly action in resolving his marital problems. The accused is not an uneducated man. He is an officer of the law, holding the rank of a lance corporal at the material time. There is nothing to indicate or suggest that he was by nature a violent and aggressive man or that he was afflicted by a history of mental or emotional problems. On the contrary, from his demeanour in court, he gave an outward impression of being a calm and collective person. D E F G
>
> Furthermore, this is a case where it is reasonable to say that if there was provocation, this would or could conceivably have emerged or commenced from the time the accused discovered that his wife Maray had surreptitiously left their matrimonial home in Kuala Lumpur for Kuching with their child. It is quite probable that this provocation was further fueled by his suspicion that his wife Maray was perhaps having an affair with another man when he received the threatening telephone calls from Kuching. His subsequent actions, upon his arrival in Kuching on 2 March 1996 in conducting what amounted to a stake-out of the stall owned by his mother-in-law at the Satok Sunday Market, were symptomatic of an attempt not merely to locate his wife Maray but also of a desire to confirm and fortify his suspicion of her infidelity. That suspicion appeared to have been further reinforced when he saw his wife with another man Awang Jamaluddin PW7 at the stall and later when his wife told him, in reference to PW7, that he was her man. H I

> From the series of events which I have highlighted above, it would seem that the provocation, which the accused alleged to have suffered, was a gradual one. It was not sudden, even if it could be accepted that the accused had eventually become offended on being told by his wife that PW7 was her man. I am of course of the view that such an offensive rebuttal would not have prompted or caused a reasonable man, placed in the position and circumstances the accused was placed, to become so provoked as to lose his self-control thereby causing him to suddenly whip out a knife and stab his wife to death.
>
> Whilst on the subject of the knife, let me digress for a moment and consider the allegation of the accused that he bought the knife for self-protection as he felt he was being followed by two men after he alighted from a bus at Jalan Satok, Kuching, on 2 March 1996. He said it was also because he had earlier received threats through the telephone when he was in Kuala Lumpur and that he was disadvantaged by the loss of use of his right hand.
>
> In short, I find his explanation of the matter to be totally untrue. In my view, he had purchased it for some dark motives which culminated in the eventual stabbing of his wife Maray. It was not for the purpose of self-protection as he alleged. Thus, on a thorough and comprehensive consideration and evaluation of the whole evidence, I am unable to find any substance or merit in the defence of grave and sudden provocation raised by the defence. It has no application on the facts and circumstances of this case...

COURT OF APPEAL

[11] In dismissing the appeal the Court of Appeal (Lamin PCA, Abu Mansor JCA (as he then was) and Haidar JCA (as he then was)) ruled that the learned trial judge had considered the evidence of the witnesses who saw the incident and was entitled to accept it. He was right in his findings that the appellant had intentionally inflicted the injuries on the deceased. He had also adequately considered the appellant's defence of grave and sudden provocation and came to the correct conclusion that the provocation was gradual.

APPEAL TO THIS COURT

[12] Before us, learned counsel for the appellant argued that the crime of murder was mitigated by the fact that the act of killing was contributed by gradual and accumulated provocation and the act of killing was a reaction rather than an action done in the heat of moment. Thus, he urged the court to substitute the conviction for culpable homicide not amounting to murder under s 304 of the PC and cited *Public Prosecutor v Lim Eng Kiat* [1995] 1 MLJ 625, *Mat Sawi bin Bahodin v Public Prosecutor* [1958] MLJ 189, and *Looi Wooi Saik v Public Prosecutor* [1962] MLJ 337 in support of his argument.

[13] The defence of grave and sudden provocation falls within Exception 1 to s 300 of the PC which reads:

> Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
>
> The above exception is subject to the following provisoes:
>
> (a) that the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person;

(b) that the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the power of such public servant;

(c) that the provocation is not given by anything done in the lawful exercise of the right of private defence.

Thus, in order to bring the case within the exception it is necessary that the following facts should be established:

(i) The offender must have done the act whilst deprived of the power of self-control.

(ii) He must have been so deprived by reason of the provocation.

(iii) The provocation must have been grave and sudden.

(iv) The provocation must not have been sought by the offender.

(v) It must not have been voluntarily provoked by the offender as an excuse for doing the act.

(vi) The provocation must not have been given by anything done —

(a) either in obedience to the law or

(b) by a public servant in the lawful exercise of his powers as such or

(c) in the lawful exercise of the right of private defence.

(see *The AIR Manual* (5th Ed, 1989) p 927)

[14] The question whether the provocation was grave and sudden such as to make the accused to lose his self-control is a question of fact and not one of law (see Explanation to Exception 1 to s 300 of the PC; *Kuan Ted Fatt v Public Prosecutor* [1985] 1 MLJ 211 (FC)). Each case is to be considered according to its own facts. The court must decide on the particular circumstances of that case whether the provocation was grave and sudden enough to permit an indulgent view of the crime committed by the accused (see *Ratanlal & Dhirajlal*, *The Indian Penal Code*, (29th Ed, 2002) p 1194).

[15] The test of grave and sudden provocation was clearly stated in the Supreme Court case of *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251. Seah SCJ in delivering the judgment of the court said at p 253:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* AIR 1962 SC 605, 530).

In determining what amounts to grave and sudden provocation the court may take into account the habits, manners and feelings of the class or community to which the accused belongs, but not of the particular idiosyncracies of the accused (see *Madhavan v State of Kerala* AIR 1966 Ker 258 (260)).

[16] It is also said that the defence of provocation is a dual one: the alleged provocative conduct must be such as: (i) actually causes in the accused; and (ii) might cause in a reasonable man, a sudden and temporary loss of self-control as the result of which he kills the deceased.

[17] Thus, in order to successfully set up provocation as a defence for the reduction of the offence of murder to one of culpable homicide not amounting to murder, it is not enough to show that the accused was provoked into losing his self-control; it must be shown that the provocation was grave and sudden and must have by its gravity and suddenness caused a reasonable man to lose his self-control and induced him to do the act which caused the death of the deceased. In determining that question the court may also consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation (see *Ratanlal & Dhirajlal*, p 1192; *Vijayan v Public Prosecutor* [1975] 2 MLJ 8).

[18] We now proceed to consider the cases cited by the appellant.

[19] In *Lim Eng Kiat*, the accused was charged with the murder of his wife (Liaw) by strangling her to death, an offence punishable under s 302 of the Brunei Penal Code. He was alternatively charged with culpable homicide not amounting to murder under the first limb of s 304 of the Code. The accused admitted that he had killed Liaw. It was contended that on the day of the killing, Liaw had confessed to adultery and made an insulting reference to the size of his penis. Finding the accused guilty of culpable homicide not amounting to murder, the High Court of Brunei held that Liaw's confession of adultery to the accused and the insult about the size of the accused's penis amounted to grave and sudden provocation and he killed Liaw when it made him lose his self-control and that an ordinary person of the accused's race, class and background would have been provoked in similar circumstances. Unlike in that case, the defence of grave and sudden provocation in the present case was not applicable as the words uttered by the deceased would not have prompted a reasonable man placed in the situation and circumstances the appellant was placed to become so provoked as to lose his self-control and killed her. Thus, *Lim Eng Kiat* is distinguishable on the facts and is therefore not applicable.

[20] The other two cases of *Mat Sawi* and *Looi Wooi Saik*, cited by the appellant are not really relevant to the case before us. The convictions for the murder in those two cases were set aside and convictions for culpable homicide not amounting to murder under s 304 of the PC substituted on appeal were not because of the successful application of the defence of grave and sudden provocation but because of the misdirections by the trial judges to the jury on the defence of provocation in *Mat Sawi* and the burden of proof of the defence in *Looi Wooi Saik*.

[21] See also *Kuan Ted Fatt*. In that case, the defence of grave and sudden provocation was not successful even though the words uttered by the deceased to the accused 'If I had raped your wife, so what?' seemed to be more gravely provocative as compared to the words uttered in the instant case.

[22] In the present case, the only provocation was a suspicion in the mind of the appellant that the deceased was unfaithful to him when she referred to PW7 as 'He is my man'. What was found by the learned trial judge was that the provocation was gradual. He was right. To our minds, there is no such thing as gradual and accumulated provocation that amounts to grave and sudden provocation. Devoid of its gravity and suddenness (as in the case here) a gradual and accumulated

provocation is not sufficient to constitute a defence under Exception 1 to s 300 of the PC. The provocative acts of the deceased were not capable of constituting provocation sufficient to reduce the charge of murder to culpable homicide not amounting to murder. Further, the brutal retaliation by the appellant was not proportionate to the provocation. We agree with the learned trial judge that a reasonable man placed in the situation and circumstances the appellant was placed would not have acted as the appellant did.

[23] We agree with the Court of Appeal that the learned trial judge was correct in his approach on the defence of grave and sudden provocation in line with what had been stated in *Lorensus Tukan*. In our judgment, the learned trial judge had fully considered the evidence relied on by the appellant on the defence of grave and sudden provocation. He gave his reasons why he rejected the defence. See part of his judgment under 'High Court'. It is trite law that an appellate court should be slow in disturbing a finding of facts by the trial judge unless such finding is clearly against the weight of evidence which is not the case here.

[24] We have read with care the record of appeal and the grounds of judgment of the Court of Appeal and we are satisfied that the Court of Appeal was right to concur with the decision of the learned trial judge that the appellant had failed to bring his case under the defence of grave and sudden provocation within Exception 1 to s 300 of the PC. The appellant was rightly convicted.

[25] Accordingly, we dismissed the appeal.

Appeal dismissed.

Reported by Sivapragasam Kumaran